Servicios Sanitarios de Puerto Rico d/b/a A-1 Portable -Toilet Services and Sindicato Puertorriqueno de Trabajadores. Cases 24–CA–7188 and 24–RC–7713

July 18, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issues presented here are whether the judge correctly found the Respondent violated Section 8(a)(1) of the Act by implicitly threatening plant closure if its employees chose to be represented by the Union and violated Section 8(a)(3) and (1) of the Act by discharging employees Rafael Rodriguez and Fernando Borrero for engaging in union activities.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order, as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Servicios Sanitarios de Puerto Rico, Inc., d/b/a A-1 Portable Toilet Services, Ponce, Puerto Rico, its offi-

The Respondent also claims in exceptions that the judge prejudicially failed to reschedule the hearing because Manuel Alvarez, the Respondent's owner, was allegedly not available to testify. There is no record substantiation of the Respondent's claim. Its counsel never made a request on the record to postpone the hearing. Furthermore, the judge inquired daily about the witnesses that the Respondent intended to call, and the Respondent's attorneys never indicated that Alvarez' testimony was necessary for, much less critical to, the Respondent's defense. In fact, at the end of the first day of the hearing, one of the Respondent's attorneys specifically stated that he did not think he would use Alvarez as a witness. At the conclusion of the hearing, this same attorney rested the Respondent's case after expressly and unequivocally telling the judge that there were "[n]o more witnesses."

³We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). In accordance with the General Counsel's cross-exception, we shall also require that the remedial notice be posted in both English and Spanish.

cers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

- 1. Substitute the following for paragraphs 2(a)–(f).
- "(a) Within 14 days from the date of this Order, offer Rafael Rodriguez and Fernando Borrero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- "(b) Make Rafael Rodriguez and Fernando Borrero whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.
- "(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.
- "(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- "(e) Within 14 days after service by the Region, post at its facility in Ponce, Puerto Rico, English and Spanish copies of the attached notice marked "Appendix."23 Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 1995.
- "(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."
- 2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the proceeding in Case 4–RC–7713 is severed and remanded to the Region. The Regional Director for Region 24 shall, within 14 days of this Decision and Order, open and count the ballots of Rafael Rodriguez and Fernando Borrero. The

¹On March 29, 1996, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a cross-exception and brief in support, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against Rafael Rodriguez and Fernando Borrero, or any other support for or activities on behalf of Sindicato Puertorriqueno de Trabajadores, or any other labor organization.

WE WILL NOT threaten you with the closure of our facility and loss of jobs to dissuade you from supporting Sindicato Puertorriqueno de Trabajadores, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Rafael Rodriguez and Fernando Borrero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rafael Rodriguez and Fernando Borrero whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Rafael Rodriguez and Fernando Borrero, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

Sanitarios de Puerto Rico d/b/a A-1 Portable Toilet Services

Harold Hopkins Jr., Esq., for the General Counsel.Ana Campos Gavito and Jose Rodriguez, Esqs., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMAN, Administrative Law. Judge. Pursuant to a charge filed by Sindicato Puertorriqueno de Trabajadores (the Union) on May 15, 1995,¹ the Regional Director for Region 24 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on June 30, alleging that the Respondent, Servicios Sanitarios de Puerto Rico, Inc. d/b/a A-1 Portable Toilet Services, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On July 26, the Respondent filed an answer to the complaint admitting some and denying other allegations contained there, and denying the commission of any unfair labor practices.² A hearing on the complaint allegations was held before me in Hato Rey, Puerto Rico, from September 20–22, during which all parties were afforded full opportunity to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record.

On the basis of the entire record in this proceeding, including my observation of the demeanor of the witnesses, and having duly considered briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT³

I. JURISDICTION

The Respondent, a Puerto Rico corporation, with an office and place of business in Ponce, Puerto Rico, is engaged in the business of renting and servicing portable toilet equipment to various companies, including construction companies, to governmental agencies, and to the United States Armed Forces. During the past 12 months, a representative period, the Respondent, in the course and conduct of its business operations, purchased and received at its Ponce facility goods valued in excess of \$50,000 from other enterprises, including American Petroleum and Crowley Maritime, located within the Commonwealth of Puerto Rico, which in turn received the goods directly from points and places located outside the Commonwealth of Puerto Rico. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The issues raised by the pleadings are: (1) whether Respondent violated Section 8(a)(1) of the Act by unlawfully

¹ All dates here are in 1995 unless otherwise indicated.

² Attached to Respondent's answer are affidavits given by its operations manager, Juan Carlos Cintron (see also G.C. Exh. 22), to the Board on June 30, and an affidavit taken from clerical employee, Yanitza Santos, by Respondent (G.C. Exh. 1[j]).

³The findings of fact made in this case are based on a compilation of the credited testimony, exhibits, and stipulations of fact, viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this decision may appear to contradict my findings of fact, such evidence has not been disregarded, but rather has been rejected as either not credible, lacking in probative weight, surplusage, or irrelevant. Credibility findings have been made on the basis of the entire record, including the inherent probabilities of the testimony and the demeanor of witnesses. Where required, I have set forth specific credibility findings.

threatening an employee in late April with job loss because of his support for the Union;⁴ (2) whether it discharged employees Rafael Rodriguez and Fernando Borrero because of their activities on behalf of the Union; and (3) whether Borrero was a statutory supervisor at the time of his discharge.

B. The Facts

In December 1994, Respondent's owner, Manuel Alvarez, purchased A-1 Portable Toilets, Inc. from Horacio Sotolongo, and thereafter began operations as Servicios Sanitarios de Puerto Rico, Inc. d/b/a A-1 Portable Toilet Services. At all relevant times here, the Respondent employed approximately 9 drivers who deliver and service some 700 portable toilet units to various clients throughout the island of Puerto Rico, 1 mechanic, Rafael Rodriguez, who serviced and maintained the 7 vacuum trucks used by drivers,5 a clerical staff,6 and Colon. The accountant, Eddie Respondent's managerial/supervisory staff includes its owner, Alvarez, Operations Manager Juan Carlos Cintron, and Route Supervisor Nelson Romeu.7

Alleged discriminatee Rodriguez had been employed as a mechanic by A-1 Portable Toilets for approximately 16 years before Alvarez purchased the business, and continued working as Respondent's sole mechanic performing a variety of duties that included, as previously noted, general maintenance and repair on the vacuum trucks, carpentry work, general repairs to the toilet units, and the designing of vacuum systems for the trucks.

Alleged discriminatee Borrero was hired by A-1 Portable Toilets as route supervisor in November 1994, and continued in that capacity when Respondent took over in December 1994. In February, the Respondent hired Romeu to be its route supervisor. Borrero testified that soon thereafter, at a meeting of all drivers, Romeu introduced himself as super-

visor for routes and services, presented the drivers with a list of rules he expected followed, and asked drivers to acknowledge receipt of the rules by signing the document. Borrero refused to sign before speaking with Alvarez. Borrero then met with Alvarez to discuss Romeu's duties, which Borrero had been performing, and was advised by Alvarez that he would now be working as a driver. Following his meeting with Alvarez, Borrero turned in his keys to the premises and his "beeper" to Romeu. Borrero stated that when he became a driver, he initially performed work in Respondent's yard, including driving a forklift, and cleaning and delivering the portable units. In March, Borrero was reassigned to service the "San Juan" route, in place of employee Angel Rivera who had quit, and performed this function until on or about May 4. On May 4, Borrero was again assigned to the yard and, on May 8, began learning employee Rafael Arroyo's route, as he was scheduled to service this route while Arroyo was on vacation scheduled to begin May 15.

On April 17, Rodriguez and Borrero met with Union Vice President Santos Silva at the Union's office in Ponce and received information on how to organize Respondent's employees. Rodriguez testified, without contradiction, that employees had expressed dissatisfaction over their shortened work hours and Respondent's failure to provide them with timely reimbursement for expenses they incurred while on the road, and that it was these problems which led him and Borrero to seek out the Union. After speaking with Silva, Rodriguez met with the drivers at a park located near Respondent's premises, and advised them of his meeting with Silva, and of the steps needed to unionize. According to Rodriguez' uncontroverted testimony, the employees expressed an interest in being organized, and thereafter authorized him to take the steps necessary for them to do so. Either the next day or soon thereafter, Rodriguez revisited the Union's office and obtained the necessary authorization cards. Borrero credibly testified that he discussed the Union with employee LaPorte while servicing one of the routes.

The day after obtaining authorization cards from Silva, Rodriguez, with cards in hand, met with employees at the rear section of Respondent's yard. Rodriguez credibly testified that he filled out his card in the presence of employees and that, on doing so, stated aloud, "I am going to deal with the Puerto Ricans in the Sindicato Puertorriqueno de Trabajadores, and here is my card." He further credibly testified that Cintron and Romeu were only a few feet away and could not have avoided seeing him sign his card or hear him make his prounion declaration. Borrero also testified, without contradiction, that he too signed a card at about the same time, and that Romeu was standing nearby and saw him sign it. Borrero also handed LaPorte a card which the latter signed and returned to Rodriguez.8 On receipt of all the signed cards, 10 in all, Rodriguez and Borrero delivered them to Silva at the Union's office.

⁴The General Counsel was granted leave to amend the complaint at the hearing to include this allegation. The Respondent has denied the allegation. In his posthearing brief, the General Counsel moved to further amend this allegation to read that the alleged conduct occurred in late April "or early May." He contends that further amendment is needed to "conform the pleading to the evidence" because the evidence, in his view, shows that this conduct may have occurred in early May. The General Counsel's posthearing motion to further amend this particular allegation is denied. Initially, the evidence does not establish that the conduct occurred in early May, as the General Counsel suggests. Further, Respondent has not had proper notice of his motion, or an opportunity to respond. In any event, given my findings herein such an amendment is unwarranted.

⁵Two of the seven vacuum trucks are kept in reserve. Respondent also owns a pickup truck that is used for general purposes, e.g., mail/supply pickups, bank trips, etc.

⁶The clerical staff included employees Maritza Rivera, who was in charge of the office, Yanitza Santos, and another employee identified only as Waleska.

⁷Although the complaint does not allege Romeu to be a 2(11) supervisor, the evidence of record, including Cintron's testimony, makes clear, and I so find, that Romeu is indeed a supervisor. Thus, Romeu has issued memoranda to employees on a variety of subjects in which he identified himself as 'troutes and services' supervisor (G.C. Exhs. 12, 25), and Cintron testified that Romeu has issued warnings to employees. (Tr. 329.) Further, Borrero's uncontradicted testimony reflects that Romeu replaced him as supervisor and that he confirmed this fact with Alvarez. Respondent, in any event, does not contend otherwise.

⁸Rodriguez was not clear when he signed his card, which is undated. (G.C. Exh. 8.) However, Borrero testified that he signed his card .April 24, the date shown on his card. (G.C. Exh. 9.) As Rodriguez testified, without contradiction, that he and Borrero were together when he signed his card, I find that Rodriguez also signed his card on April 24, and that his meeting with employees occurred that same day.

On April 27, the Union filed a representation petition with the Board in Case 24–RC–7713 seeking to represent the following employees of Respondent:

All service and maintenance employees including, without limitation, drivers, mechanics and maintenance employees employed by the Employer within the Commonwealth of Puerto Rico, but excluding all office employees, managerial employees, guards and supervisors as defined by the National Labor Relations Act, as amended.

A copy of the petition was served on Respondent along with a Notice of Conference dated May 1, advising that a conference was scheduled for May 8, at the Board's Regional Office. Respondent's accountant, Colon, admits receiving the petition and Notice of Conference letter on May 4, and having had several phone conversations with a Board agent regarding the petition, the first of which he admits occurred before May 10. He testified he notified Cintron of the petition right after the first call from the Board agent, but denied informing Alvarez of the petition.

On completion of their work assignments at around 3 p.m. on May 10, Cintron informed Rodriguez and Borrero that Alvarez wished to speak with them, and asked them to wait around until Alvarez returned from a trip to San Juan. Rodriguez and Borrero waited until 6-6:30 p.m., and when Alvarez failed to show up, Cintron handed them severance checks and informed them, without explanation, that they were being terminated. Rodriguez testified, without contradiction, that when he asked why he was being fired, Cintron simply replied that he would have to talk to Alvarez about the matter. Borrero similarly testified without contradiction that he too requested the reasons for his discharge, and that Cintron stated he did not know, and was merely following orders given to him that morning by Alvarez. Borrero also asked Cintron to provide him with a discharge letter, which he never received. Borrero's uncontroverted testimony further reveals that Romeu was present during this meeting but said nothing.

On June 29, a representation election was held among employees in the above-described bargaining unit during which Rodriguez served as the Union's observer. Of the 10 ballots cast, 3 were cast for and 3 against the Union. While permitted to vote, the ballots of Rodriguez and Borrero were challenged by Respondent on grounds that both were fired for just cause and were ineligible to vote, and as to Borrero because he was a statutory supervisor and not entitled to vote. As their votes could affect the outcome of the election, the Regional Director on August 15 ordered the representation case consolidated with the instant unfair labor practice case for resolution of the challenged ballots.

C. Discussion and Findings

1. The 8(a)(1) allegation

The complaint, as amended at the hearing, alleges that sometime in late April, the Respondent threatened employees with plant closure job loss if they supported the Union. In support thereof, the General Counsel cites Rodriguez' testimony that "two or three days" after signing his authorization card, he said to Cintron, "[L]ook, we have already be-

come unionized," and that Cintron responded by stating that "the Union was going to knock down the 'kiosk." Rodriguez countered that Respondent's operation was not a kiosk. Rodriguez understood Cintron's "kiosk" remark to mean that because of their support for the Union, Respondent might close its facility resulting in a loss of jobs.

The Respondent's assertion in its posthearing brief that Cintron "firmly denied" having made the "kiosk" remark is not supported by record evidence, for no such denial can be found in Cintron's testimony. Cintron, in fact, was neither asked to confirm or deny, nor indeed questioned about, the "kiosk" incident. While it questioned Cintron extensively on other matters, Respondent's failure to inquire into Cintron's knowledge of, or involvement in, this alleged threat, warrants an adverse inference that any such testimony would not have been favorable to Respondent. Asarco, Inc., 316 NLRB 636, 640 (1995); Purolator Armored, 268 NLRB 1268, 1276 (1984). The Respondent, in any event, argues that Rodriguez' account of this incident is not credible, because Borrero failed to corroborate that the conversation occurred, and because Rodriguez purportedly was inconsistent in his description of what Cintron actually said.9 As to the former, the Respondent's assertion is premised on a mistaken belief that the "kiosk" conversation occurred during the card-signing incident. Rodriguez, as noted above, credibly testified that the "kiosk" conversation occurred a few days after the authorization cards were signed, and neither he nor Borrero testified that the latter was present when Cintron made the remark. Contrary to Respondent, there are also no inconsistencies in Rodriguez' testimony as to what Cintron said to him. It is true, as pointed out by the Respondent, that in his testimony Rodriguez makes the remark that "the boat is going to sink, we would be left out in the street." However, when viewed in its proper context, it is patently clear that Rodriguez was not attributing this remark to Cintron, but rather was expressing his view as to what Cintron intended to convey when he made his "kiosk" remark. As Rodriguez' testimony in this regard was not refuted, I credit it and find that Cintron did indeed make the "kiosk" remark. The question remains, however, whether the comment amounts to free speech or is coercive of employee rights.

An employer's interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations is unlawful under Section 8(a)(1) of the Act. However, oftentimes verbal communications between employees and management alleged as unlawful raise questions of whether the communication is protected under the "free speech" provision of Section 8(c) of the Act. In essence, Section 8(c) provides that the expression of "any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.' The test for determining whether a communication violates Section 8(a)(1) does not turn on employer motivation or on the success or failure of the alleged unlawful conduct, but rather on whether it can reasonably be said that the alleged conduct "tends to interfere with" the employees' free exer-

⁹ According to Respondent, Rodriguez altered his testimony as to what Cintron actually said by testifying that Cintron told him, "the boat is going to sink, or the ship is going to sink, and we would be left out in the street." (Tr. 62.)

cise of the rights afforded them under Section 7 of the Act. Williamhouse of California, Inc., 317 NLRB 699, 713 (1995); Pollution Control Industries of Indiana, 316 NLRB 455, 461 (1995).

The Respondent does not assert that Cintron's "kiosk" comment amounted to protected speech under Section 8(c). Rather, it claims only that the comment was never made, an argument which, as noted, I have rejected. Cintron's remark, made right after being informed that employees had decided to unionize, undoubtedly was clearly intended as a not so subtle threat to Rodriguez that by bringing in the Union, he and other employees ran the risk that Respondent might shut down its facility and put employees out of work. It cannot, by an stretch of the imagination, be construed as a simple comment by a supervisor that a union would not be advantageous to employees, as Respondent suggests in its posthearing brief. The Board has long found an employer's threat to close its place of business if employees choose representation by a union to be a clear violation of the Act. Silvey Refrigerated Carriers, 244 NLRB 1006, 1008 (1979). Thus, in Flexsteel Industries, 316 NLRB 745, 759 (1995), Administrative Law Judge Evans noted, with Board approval, that "[a]mong the panoply of threats that antiunion employers can make, possibly the most destructive of employee rights are threats of discharge and plant closure." Accordingly, Cintron's remark, attributable to Respondent, amounts to a clear violation of Section 8(a)(1) of the Act.

2. The 8(a)(3) allegations

a. Applicable principles

In Wright Line, 251 NLRB 1083 (1980), 10 the Board set forth a causation test to be used in determining whether a discharge violates Section 8(a)(3) and (1) of the Act. Under Wright Line, the General Counsel bears the initial burden of showing that an employee's protected activity was a motivating factor in an employer's decision to discharge or otherwise discipline an employee. "The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus." Packaging Techniques, 317 NLRB 1252, 1257 (1995). Once this is established, the burden shifts to the employer to demonstrate that the discharge or discipline imposed would have occurred even in the absence of the protected conduct. An employer cannot satisfy its burden by simply presenting a legitimate reason for its actions; rather, it must "persuade by a preponderance of the evidence" that the same action would have taken place even in the absence of the protected conduct. T & J Trucking Co., 316 NLRB 771 (1995). However, when the employer's explanation for its actions are found to be pretextual—that is, if the reasons either did not exist or were not in fact relied on-the employer will not have satisfied its burden and the inquiry is ended at that point. Berg Product Design, 317 NLRB 92, 95 (1995), citing Limestone Apparel Corp., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

b. Rodriguez' discharge

The General Counsel clearly has made a prima facie showing that Rodriguez' May 10, discharge was motivated by antiunion, considerations. The undisputed evidence reveals that Rodriguez was the Union's chief proponent who almost single-handedly organized Respondent's drivers. Thus, it was Rodriguez, assisted by Borrero, who made the initial contact with the Union in mid to late April seeking representation, who gathered employees soon after his meeting with Silva to discuss unionizing, who, in plain view of everyone, including Supervisors Cintron and Romeu, signed an authorization card and expressed aloud his prounion position, and who solicited signed authorization cards from most of the drivers. His involvement in union activities is therefore irrefutable.

The credible evidence of record further establishes unequivocally that Respondent knew of Rodriguez' involvement in such activities. Rodriguez, as noted, credibly and without contradiction, testified that Supervisors Cintron and Romeu were present during the card-signing incident on April 24, and that, given their proximity, must have heard him make his prounion remark and seen him and others fill out authorization cards. Borrero corroborated Rodriguez regarding Romeu's presence at the meeting, and as to the fact that Romeu was close enough to have seen him and, inferentially, others sign authorization cards.¹¹ Romeu was not called as a witness to rebut Borrero's or Rodriguez' testimony linking Respondent to knowledge of their union activities, even though he could reasonably have been expected to be favorably disposed to Respondent. Accordingly, an adverse inference is warranted that any such testimony by Romeu would not have supported Respondent's claim of ignorance of such activities. Flexsteel Industries, supra, at 757-758. Further, although Cintron denied seeing Rodriguez or Borrero fill out their authorization cards, he did not deny being present at the card-signing meeting. In any event, Cintron's lack of candor with respect to other matters renders his denial in this regard suspect, if not palpably false. Cintron, for example, denied having any knowledge of employee union activity or of Rodriguez' and Borrero's involvement with the Union prior to their May 10, discharges, and claims only that on May 11, he first got "a small impression" that something was going on because he noticed that drivers did not go directly to work but just hung around Respondent's office. His claim in this regard is contradicted by the fact that, as found above, Rodriguez in late April told him that the drivers were unionizing, and runs contrary to Colon's more believable testimony that he showed Cintron a copy of the Union's representation petition sometime prior to May 10.12 Given the above facts and reasonable inferences, I conclude that Respondent not only knew prior to May 10, that its employees were attempting to organize, but also that Rodriguez and Borrero were clearly involved in, and might be in the forefront of, such activities.

¹⁰Enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

¹¹ While Borrero did not mention that Cintron was present during this incident, I attribute this more to a brief lapse in memory, rather than to any prevarication on his part regarding the events of April 24

¹² Cintron could not recall Colon showing him the representation petition. His failure to recall this vital piece of information renders suspect his testimony in this and other matters.

Further, Cintron's threat of possible plant closure and loss of jobs should employees bring in the Union establishes quite clearly Respondent's antiunion animus, and the abrupt manner in which the discharges occurred, e.g., without warning or explanation, the suspicious timing of the discharges, within 2 weeks of the card-signing incident and shortly after Respondent received notice of the representation petition, and the simultaneous discharge of the two leading union adherents, is persuasive evidence of Respondent's unlawful motivation in discharging these individuals. CleanSoils, Inc., 317 NLRB 99, 108 (1995); Montgomery Ward & Co., 316 NLRB 1248, 1253 (1995). As the General Counsel has made a strong prima facie showing that Rodriguez' discharge was motivated by his union activities, the burden shifts to Respondent to show that it had legitimate, nondiscriminatory reasons for terminating Rodriguez on May 10, and that it would have followed this course of action even if Rodriguez had not engaged in protected activities.

A review of the reasons proffered by Respondent for discharging Rodriguez reveals them to be pretextual. As an initial matter, I find it significant that while the decision to terminate Rodriguez and Borrero was made by Respondent's owner, Alvarez, he was not called to testify in this matter, despite being the only individual who could best explain why he chose to discharge the two. The Respondent chose instead to rely solely on Cintron's testimony, whose credibility, as previously noted and as further discussed here, is questionable, at best. 13 Given that Cintron was not a credible witness, and as he was the only witness for Respondent to testify regarding the discharges, it stands to reason that the explanations proffered by him in defense of the discharge allegations are not worthy of belief. It logically follows therefore that the General Counsel's prima facie case remains intact as Respondent has failed to present any credible evidence to refute the General Counsel's case. Notwithstanding my finding in this regard, a review of the reasons given by Cintron for the discharges reveals that the alleged misconduct either did not occur or was pretextual in nature.

While Cintron declined to tell Rodriguez (as well as Borrero) the reasons for their discharge, ¹⁴ at the hearing he offered several reasons for discharging Rodriguez, chief among which is a claim that Rodriguez was often insubordinate and frequently disobeyed instructions given to him by Cintron. He testified, for example, that on one occasion in January, Rodriguez was instructed to remove certain parts

from a truck to be used in other vehicles, and that Rodriguez refused to do so, claiming that the truck had been given to him and that he planned to take it home. Cintron claims he informed Alvarez of this and that Alvarez had to travel from San Juan to the shop to settle the matter. Cintron concedes that the issue was resolved shortly thereafter, that Rodriguez did as he had been instructed to do, and that that was the end of the matter. The other incident of insubordinate conduct mentioned by Cintron as grounds for the discharge occurred in February when Rodriguez purportedly failed to properly repair a leaky gas tank on Respondent's Mitsubishi pickup truck, causing Cintron to call an outside mechanic to redo the work properly.¹⁵ Cintron cited no other instances of insubordination, but stated generally that Rodriguez had an "attitude" towards him evident from the fact that Rodriguez always seemed to question his instructions, particularly his insistence on adhering to a past practice regarding the purchase of new parts for the company vehicles, rather than going along with Cintron's instructions that he use old spare parts for repairs.

Rodriguez gave a somewhat different and, in my view, more credible version of the above two truck incidents. Regarding the alleged January incident, Rodriguez testified that the truck in question, an Isuzu model, was wrecked after sliding down a cliff sometime prior to Alvarez purchasing the Company and was towed and placed in a corner of the lot, where it remained until Alvarez assumed ownership of the facility. On taking over, Alvarez told Rodriguez he was going to clean the lot and did not want the wrecked Isuzu on his premises, and directed Rodriguez to move it. Rodriguez thereafter sought and obtained consent from the owner of the adjacent lot, Rivera, to put the truck on his property. A month or so later, presumably in January, one of Respondent's older Isuzu trucks broke down and Cintron told Rodriguez that he needed the motor from the wrecked truck installed in the older Isuzu. Rodriguez told Cintron that the wrecked Isuzu had been given to him to discard and therefore belonged to him. Cintron, however, informed Rodriguez that the truck still belonged to the company, not to him. Shortly thereafter, Rodriguez discussed the matter with Alvarez, and expressed to him what he believed had been a misunderstanding as to what Alvarez had intended when he instructed Rodriguez to remove the truck from the lot. Following this discussion, Rodriguez agreed to remove the motor and other parts from the wrecked truck for use in other company vehicles. According to Rodriguez, the motor was placed in the older Isuzu and, contrary to Cintron's assertion, has continued to function well. Rodriguez' assertion that nothing further was said to him about the incident since January was not disputed by Cintron.

While there is no question that the January incident occurred, I find it highly unlikely that this incident factored into . Respondent's decision to terminate Rodriguez. Rodriguez' explanation that the entire matter resulted from a misunderstanding is quite plausible. Thus, unlike Cintron's

¹³ In his affidavit to the Board, Cintron states that Alvarez consulted with him on May 9, regarding the decision to discharge Rodriguez and Borrero. (See G.C. Exh. 22, par. 5.) However, Borrero, as noted, testified that when he asked Cintron why he had been discharged, Cintron claimed he did not know and was simply following Alvarez' orders. I credit Borrero that Cintron told him he did not know the reasons for his discharge, as such testimony is uncontradicted. Indeed, given that the reasons proffered by Cintron for Borrero's discharge were, as discussed and found infra, pretextual in nature, I am convinced that Cintron, unwilling to reveal to Borrero the true unlawful reason for the discharge, and not yet having had time to fully conjure up some other explanation to justify it, deemed it best to play ignorant and deny to Borrero that he knew why the discharge occurred.

¹⁴ An unwillingness to explain to a terminated employee the reason for the discharge or to provide a written statement containing such reasons, supports an inference of unlawful motivation. *Handicabs, Inc.*, 318 NLRB 890 (1995).

¹⁵ It is interesting to note that Cintron initially stated that "it was pretty much because" of these two vehicle incidents that Rodriguez was discharged. (Tr. 289.) He subsequently added that Rodriguez' bad "attitude" towards him also factored into the discharge decision. However, terms like "bad attitude" are often mere euphemisms for those harboring union sympathies. See, *World Fashion*, 320 NLRB 922 (1996).

description of the incident which was sketchy at best, Rodriguez provided a detailed explanation as to how the Isuzu truck came to be damaged in the first place, why it wound up in an adjacent lot that was not Respondent's property, and why he came to believe that the truck was given to him by Alvarez, salient facts that Cintron conveniently chose not to mention in his testimony. Alvarez, who could have shed some light on the circumstances surrounding this incident, was not called, and Rodriguez' testimony that he and Alvarez viewed the matter as a simple misunderstanding that was soon resolved and not discussed further remains undisputed and is credited. It is patently clear that when the incident first occurred in January, Respondent did not view Rodriguez' behavior as insubordinate or improper, but simply treated it as a misunderstanding, for he received no warning, writeup, suspension, or other discipline for any of his actions or statements during this incident. Given these circumstances, it is highly unlikely that this particular incident, which occurred almost 4 months prior to the discharge and for which no discipline was apparently warranted at the time, played any role in Respondent's decision to terminate Rodriguez, and for Respondent to suggest otherwise strains credulity. Rather, I am convinced that the Respondent dredged up this incident in an effort to mask the true reason for discharging Rodriguez, e.g., his union activities.

Regarding the leaky tank on the Mitsubishi truck, Rodriguez testified, contrary to Cintron, that the truck was repaired in December 1994, not February, and that because of the danger involved with this particular repair job, the work was not done by him, as testified to by Cintron, but was instead sent out to a welding specialist for repair. According to Rodriguez, Alvarez and Cintron were both informed that the work was being done by an outside repairman. The record reflects that the \$70 repair cost was paid up front by Rodriguez and that he was subsequently reimbursed that amount. (G.C. Exh. 6.) Thus, while Rodriguez' testimony is fully corroborated by General Counsel's Exhibit 6, Cintron's contrary testimony is not. Accordingly, the latter's testimony regarding this incident is not credited. Rather, I find that Rodriguez did not improperly repair the gas tank, as suggested by Cintron, and that Respondent concocted this incident after the fact to justify discharging Rodriguez. Further, like the Isuzu truck incident, Respondent failed to explain why it waited 5 months to discipline Rodriguez for this particular incident.

Cintron, as noted, also claims that Rodriguez' general insubordinate conduct toward him also factored into the discharge decision. Cintron testified that Rodriguez had continuously engaged in such conduct since November 1994. Assuming for the moment that Cintron was being truthful in this regard, which I find he was not, he did not explain why such conduct was tolerated by Respondent for 6 months without so much as a warning, and what, if anything, Rodriguez may have done on or about May 10, to have suddenly rendered his behavior so intolerable to warrant his discharge. See T & J Trucking Co., 316 NLRB 771, 779 (1995). Again, Alvarez, the individual most likely to have the answer to this question, did not testify, and an adverse inference is warranted that he would not have been able to explain away this discrepancy. Rather, given that the purported conduct was condoned for so long, and that the discharge occurred soon after Respondent learned of Rodriguez'

union activity, it is reasonable to infer that the intolerable condition that triggered the discharge was Rodriguez' union activity and that, but for such protected activity, Rodriguez, Respondent's only mechanic, would still be in Respondent's employ.¹⁶

In summary, the credible evidence of record demonstrates clearly that the reasons proffered by Respondent for discharging Rodriguez were pretextual. When an employer's motives for its actions are found to be false, as is the case here, an inference is warranted that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1960). Accordingly, I find that the Respondent has failed to rebut the General Counsel's prima facie case, and that it discharged Rodriguez because of his activities on behalf of the Union, in violation of Section 8(a)(3) and (1) of the Act, as alleged.

c. Borrero's discharge¹⁷

The factors cited as support for a finding that the General Counsel made out a prima facie case regarding the

¹⁶Cintron also testified that Rodriguez took long lunchbreaks and that he warned him in February about this. Like his other testimony, Cintron's assertion in this regard is not credible. Even assuming, arguendo, that Rodriguez had been so warned, it is unclear from Cintron's testimony if this was a reason for discharging Rodriguez, and assuming further that it is alleged to be so, Cintron failed to explain why this purported problem was allowed to persist for several months thereafter, and did not come to a head until shortly after Respondent learned of Rodriguez' union activities. See, Casa San Miguel, 320 NLRB 534 (1995); Sound One Corp., 317 NLRB 854, 858 (1995). Moreover, while this conduct was raised at the hearing as a possible justification for the discharge, in his affidavit to the Board Cintron did not cite Rodriguez' long lunchbreaks as a reason for the discharge. (G.C. Exh. 22, par. 3.) It is further interesting to note that in his affidavit, Cintron states that Rodriguez was discharged in part because of a drinking problem which often caused him to have run-ins with other drivers and become violent. At the hearing, Cintron admitted that he had no problem with Rodriguez regarding his "drinking" and made no mention in his testimony of any problems referenced in his affidavit regarding Rodriguez' difficulties with other employees or violent behavior. Clearly, the shifting reasons given by Cintron for terminating Rodriguez is strong evidence of pretext. Corella Electric, 317 NLRB 147, 152 (1995).

¹⁷ Respondent's contention that Borrero's discharge is not unlawful because Borrero was a statutory supervisor is without merit. While the record suggests that Borrero was a supervisor prior to February 1995, it is equally clear from the record that in February, Romeu took over his duties and Borrero was thereafter reassigned to driver duties and maintained this position through the date of his discharge on May 10. Respondent argues in its posthearing brief that the fact that Borrero retained his prior salary and benefits is evidence that he was still a supervisor and had only been temporarily assigned to drive. The credible evidence of record does not support this view. Cintron's testimony that Borrero remained a supervisor is contradicted by his own affidavit in which he readily admits, without reservation or qualification, that when Alvarez took over, Borrero ceased being a supervisor and was downgraded to driver. Cintron's attempt to explain away the statement in his affidavit by suggesting that Borrero was merely "substituting" for other drivers while always remaining a supervisor is contrary to the weight of the evidence and simply did not ring of truth. (Tr. 279-280.) Borrero credibly testified that at a meeting held in February, Romeu introduced himself to the drivers as supervisor for "routes and services," the position which Borrero then held, and that in a subsequent con-

Rodriguez' discharge apply equally to Borrero's discharge. Borrero's involvement in union activity is evident from the fact that he accompanied Rodriguez on at least two occasions to the Union's office, signed an authorization card, and solicited LaPorte to sign a card. Respondent's knowledge of his activities in this regard is evident from his undisputed testimony, corroborated in any event by Rodriguez, that Romeo (and as per Rodriguez' account, Cintron) was present and clearly observed him sign his authorization card. Cintron's threat of plant closure and loss of jobs leaves no room for doubt as to Respondent's antiunion sentiments, and the abruptness of Borrero's discharge on May 10, without warning or explanation, are indicators of a discharge motivated by unlawful considerations. CleanSoils, supra. As the General Counsel has established prima facie that Borrero was discharged for his union activities, the burden shifts to the Respondent to show that it would have discharged Borrero even without regard to his union involvement.

As in his description of Rodriguez' discharge, Cintron gave shifting as well as implausible explanations for Borrero's discharge. Cintron testified that Borrero, like Rodriguez, also was insubordinate, and pointed to several incidents of insubordinate conduct which he claims formed the basis for the discharge. One such incident allegedly occurred when Borrero, according Cintron, lied to him by claiming that he owned a car battery which Cintron believed belonged to Respondent. Cintron's description of this incident was vague and couched in conclusionary terms. Its lack of specificity, in particular his failure to state when this incident is alleged to have occurred, renders his testimony in this regard unreliable. Borrero's more credible account of this incident reveals that it occurred sometime prior to November 15, 1994, before Alvarez had even purchased and taken control of the facilities! Given this undisputed fact, one can understand, but certainly not excuse or condone, Cintron's reluctance to be more specific in his testimony, for it is the height of absurdity to believe that Respondent, even assuming some misconduct had occurred, would have relied on an incident that occurred some 6 months earlier, before it had even commenced operations, to discharge Borrero.18

Cintron also stated that on one occasion, he asked Borrero to return a grass trimmer he had borrowed from Respondent and that, while Borrero told him initially he did not have it, he appeared at the office with the trimmer 2 days later, lead-

versation with Alvarez, the latter confirmed the change in his duties to driver. As noted, neither Alvarez nor Romeu was called to rebut this testimony. Thus, while Borrero may have been a supervisor sometime in February, the Respondent has not shown that at the time of his discharge, Borrero possessed any of the indicia of supervisory authority found in Sec. 2(11) of the Act. Accordingly, I find that as of May 10, Borrero was not a supervisor but was instead a member of the bargaining unit.

18 Borrero's credited testimony, in any event, establishes no wrongdoing on his part regarding the battery. Thus, Borrero stated that the battery in question was his to begin with and that he removed it from his own vehicle and placed it in the company truck when its own battery went bad. Eventually a new battery was purchased by the company for the truck driven by Borrero, at which time the latter removed his battery from the company truck and took it home. What Cintron observed was Borrero taking back his own battery. Thus, Cintron improperly assessed the situation and jumped to the erroneous conclusion that Borrero had misappropriated company property.

ing Cintron to believe that Borrero had lied to him about not having had the trimmer in the first place. This, according to Cintron, was an example of Borrero's insubordination which led to his discharge. Borrero's description of the circumstances surrounding the trimmer was, like the "battery" incident, much more detailed and consequently more believable than Cintron's vague accounting of what occurred. Borrero credibly testified that the trimmer in question previously belonged to Sotolongo, and that supervisors (including himself when he was a supervisor) had always been allowed to take the trimmer home for personal use. Borrero recalls Cintron asking him for the trimmer, but disputes the assertion that he told Cintron he did not have it. Rather, he admits that he used the trimmer more often than any other supervisor, that Cintron was aware of this, and that when the latter asked for it, he responded that he would return it the next day, which he did. While Cintron did not testify as to when this incident occurred, Borrero, while also unable to recall the exact timing of this conversation, did recall that he was still a supervisor when this incident occurred, which logically places it sometime in or before February, when he was relieved of his supervisory functions. I credit Borrero and find that he did not lie to Cintron at any time during this incident, and that he returned the trimmer the next day. Further, even if Borrero lied to Cintron regarding the trimmer, the latter did not explain why he waited almost 3 months before deciding to discipline him, and why such a minor infraction could have led to Borrero's discharge. I am convinced that this incident, assuming it did occur, played no part in Respondent's decision to discharge Borrero. Rather, I find that this incident, like the "battery" incident, was dreamt up either by Alvarez or Cintron after the fact to mask the true reason for the discharge, e.g., Borrero's union activity. Further, even assuming, arguendo, that Respondent maintained a policy of prohibiting employees from utilizing company property for their own personal use, a fact that has not been clearly established here, there is no indication that Borrero or any other employee was made aware of this policy, and no evidence that Borrero was ever warned or disciplined for any such infraction.

Another incident mentioned by Cintron as a reason for the discharge involved Borrero's alleged personal use of empty chemical drums presumably owned by Respondent. The record reflects that the chemical used by Respondent in the operation of its business is purchased and delivered in large drums to Respondent's facility, and that under the former owner, Sotolongo, Borrero had been authorized to take the empty drums for his personal use. As a result, Borrero had two of the drums at home which he used for dumping trash. Cintron testified that on April 13, he went by Borrero's home to drop off the latter's paycheck, that he saw a sign on Borrero's fence advertising drums for sale, and that he also saw two drums being used for trash. While admitting that Borrero had previously been authorized to take the empty drums for his own personal use, Cintron testified that Alvarez informed Cintron that he wanted to use the drums for storing oil, and that consequently Borrero was not authorized to take any more of the empty drums for his own use.

I find no merit in Respondent's argument that the drum incident factored into the discharge decision. First of all, Cintron's testimony that Alvarez told him that he wanted the practice changed is based on hearsay evidence and, in my

view, not credible. Alvarez' failure to testify, as noted, warrants an adverse inference that no such change in the existing practice occurred. Further, assuming arguendo that Alvarez indeed spoke to Cintron about ending the practice, there is no indication that this was ever communicated to Borrero. Nor would the fact that Borrero had a "drums for sale" sign on his fence be evidence that he was continuing to remove empty drums from Respondent's property and treating them as his own. Indeed, the sign could have been there since before Alvarez took over the business and never removed, or placed there by Borrero in an effort to sell the two drums that Cintron saw in Borrero's backyard, which Borrero credibly testified he has owned for 4 years, long before Alvarez assumed ownership of the business. In any event, it is clear that Cintron made no effort to inform Borrero of the alleged change in practice, assuming such a change was made, and did not bother to ascertain whether Borrero in fact was continuing to take the drums and selling them. Further, Borrero credibly testified that other employees, and in particular Maritza Rivera, Jorge Rivera, and Juan Quiles Medina, also had drums at their home. Cintron, however, apparently did not inquire into whether any of these individuals was removing drums from Respondent's facility, and did not explain why he decided to focus only Borrero, and not the others, regarding this incident or why, despite the fact that others may have been involved, Borrero was the only one selected for discharge. Given these circumstances, there can be no basis for assuming that Borrero engaged in any misconduct regarding the drums warranting his discharge, and Respondent's argument that Borrero was discharged in part for purportedly converting the drums for his own personal use is specious at best, and patently pretextual.

Cintron further testified that Borrero's failure to provide service to a particular customer, Carrero Engineering, was a factor in his discharge. Thus, he testified that while Borrero was substituting as driver for another employee, an official of Carrero Engineering complained that Borrero had not serviced its septic tank. Cintron claims that when he inspected Borrero's service card for Carrero Engineering, he noticed the client's signature was missing, and that he concluded from this that the customer had not been serviced.19 Borrero testified that during the period he was assigned as driver, he never received complaints from customers, and that neither Cintron nor Romeu ever mentioned anything to him of customer complaints regarding his work. I credit Borrero's testimony in this regard. Initially, I find nothing in Cintron's testimony that contradicts Borrero's above assertion, for assuming that Cintron had received a complaint from Carrero Engineering, Cintron did not state that he discussed the matter with Borrero or that Borrero was ever spoken to by anyone in management regarding his performance as a driver. Except for Cintron's self-serving claim that the discipline meted out for this infraction was Borrero's discharge, the record fails to establish that Borrero was ever warned, suspended, or disciplined in some other manner, e.g., through a reassignment of duties, for his alleged misconduct. Further, Cintron admitted that other drivers had

likewise failed to obtain signed cards from customers and were not fired, and that the problem continued even after Borrero was discharged. Thus, even if I were to believe that this incident led to Borrero's discharge, Cintron offered no explanation as to why Borrero was singled out for the harshest type of punishment, while other drivers who engaged in similar and even more serious misconduct were not so punished.²⁰ This disparity in treatment would, without more, suffice as evidence of the pretextual nature of the discharge. See Montgomery Ward & Co., 316 NLRB 1248, 1255 (1995). I am, in any event, convinced, from Respondent's failure to provide supporting evidence of any kind, that no such complaint was ever received by Respondent from Carrero Engineering regarding Borrero's performance of his driving duties, and that this incident was conjured up post hoc by Respondent to hide the true discriminatory nature of the discharge.

Another reason given by Respondent for discharging Borrero was the latter's alleged inappropriate behavior toward female employee, Yanitza Santos. The only evidence in this regard came from Cintron who testified, without much specificity, that he recalls asking Borrero on one occasion to

²⁰ The disparity in treatment of employees is evident from G.C. Exh. 23 (translated version being G.C. Exh. 23[b]), which shows that on February 2, driver Juan Quiles Medina, who engaged in the same type of misconduct allegedly engaged in by Borrero as well as committing more serious infractions, received as per Cintron's testimony a 1-month suspension, but was not discharged, for (1) failing to comply with his work schedule, arriving late for work, and being absent without notification; (2) being involved in a hit-run accident in which he negligently and carelessly caused damage to Respondent's vehicle; (3) complaints received from the customers on several occasions regarding his service; and (4) complaints from private drivers about his reckless driving. I do not believe Cintron's testimony that Medina was suspended for 1 month. While Respondent submitted Medina's payroll record showing no hours worked from February 21 through March 14, Cintron was not able to state definitively that this reflected the period of Medina's suspension. Rather, he stated only that it was his "understanding" this was the period Medina did not work due to the suspension. The payroll record contains no reference to the suspension, and it may very well be that Medina was on vacation or on leave from work for some other reason during this period. Further, the wording on the writeup given to Medina, that he would be subject in the future to either temporary or indefinite suspension if he continued "committing errors," undermines Respondent's assertion that Medina received a 30-day suspension. I am convinced that Medina was not suspended for a month, as testified to by Cintron, but rather received only the written warning identified as G.C. Exh. 23. The record also reflects that sometime in August, after Borrero's discharge, Medina may have engaged in some possible criminal misconduct when he forged the signature of a customer on a service card, but was not disciplined for it. Cintron claimed that he recommended Medina be fired, but that Alvarez declined to do so and, consequently, Medina received only a verbal warning from Romeu. Given Cintron's overall lack of credibility and Romeu's failure to testify, I am not overly convinced that Medina was even verbally reprimanded for this serious infraction. This glaring disparity in treatment by which employee Medina received no discipline whatsoever or at most a proverbial "slap on the wrist" for what reasonably amounted to dischargable offenses, while Borrero was handed the equivalent of "capital punishment" for his alleged minor infraction, establishes rather convincingly that Borrero's alleged misconduct, assuming it did occur, could not have served as grounds for his discharge. Optica Lee Borinquen, Inc., 307 NLRB 705, 714

¹⁹ According to Cintron, when service is provided to a customer, the driver is required to give the service card to the customer so that the latter may inspect the work and thereafter sign the card to verify that the work was done.

install a tank at the Rio Mar project located near a beach, and that after giving him the assignment, Borrero went over to where Santos was sitting. Cintron states that after Borrero left to perform the work, Santos complained to him that Borrero invited her to the beach. Cintron claims he thereafter spoke with Borrero regarding this incident and admonished him "to watch how he talked to the girls in the office . . . includ[ing] Maritza and Waleska when she was there." (Tr. 282; 286.) He further testified that this was not Borrero's first incident involving Santos, and that Borrero had demonstrated the same "attitude" toward the other female employees. He did not, however, explain what he meant by Borrero's "attitude." Instead, he offered the following vague description of this alleged "attitude" when he stated that Borrero "never made a sexual warning toward her [Santos?], but, yes, that in the way that he used to speak to them, and sometimes how he would look at them." (Tr. 293.)

Borrero testified that as far as he knew Santos began working with Respondent's predecessor in October 1994, as secretary and aide to Maritza Rivera, that he had very little contact with Santos, and that when he needed something from the office he would first go to Rivera and would only go to Santos when directed to do so by Rivera. He also testified, contrary to Cintron, that prior to his discharge he had never been talked to or admonished for engaging in misconduct regarding any of the three female employees. I credit Borrero.

Initially, Cintron's testimony regarding this matter was, as noted, short on details and extremely vague. The only detail proffered by Cintron was his assertion that Santos complained to him that Borrero had "invited her to the beach." Although Respondent's attorney, Ana Campos Gavito, gave every indication at the start of the hearing that Santos would testify at some point in the proceeding, on day 3 of the hearing she advised that Santos was too ill to travel. I do note, however, that with its answer, the Respondent submitted an affidavit from Santos in which the latter states that during the month of April Borrero on several occasions invited her to the beach. As Santos was not available as a witness and consequently could not be cross-examined on the contents of her affidavit, I give no credence to the affidavit. I note, in any event, that Respondent in its posthearing brief does not rely

on the affidavit to corroborate Cintron's testimony, and argues only from Cintron's testimony that Borrero engaged in the "sexual harassment" of Santos and that this was a factor in his termination. That argument, however, is contradicted by Cintron's admission that Borrero made no sexual "warning" to Santos. Nor did Cintron testify to any particular remarks having been made to the other two female employees. The only comment in Cintron's testimony that Respondent could possibly cite in support of its "sexual harassment" theory is the fact that Borrero may have invited Santos to the beach. Assuming this did occur, I find it highly unlikely that Respondent would discharge Borrero over such an innocuous remark, for by itself the remark is neither offensive nor in any way demeaning. If more was involved we do not know for Santos, as noted, was not called to testify, and Cintron's own testimony is vague and offers no clue regarding the relationship between Borrero and the three female employees.

However, having credited Borrero, I find that the incident did not occur and that, like the other incidents cited as a basis for his discharge, was a mere fabrication dreamt up after the fact to mask the true reason for the discharge, e.g., Borrero's union activities. Further undermining Respondent's claim regarding this and other reasons proffered for the discharge is the fact that on May 8, Borrero was assigned to learn Arroyo's route and was scheduled to begin servicing that route on May 15. All the incidents cited for Borrero's discharge occurred weeks and months before May 8. If Respondent intended to discharge Borrero for any or of the above-described conduct, why would it allow him to begin training for Arroyo's route on May 8, and schedule him to begin running the route on May 15? The lack of explanation for this rather abrupt discharge gives rise to an assumption that Respondent did not rely on any of the aforementioned reasons to discharge Borrero, but rather was motivated by some other unstated reason. As the only other conduct engaged in by Borrero immediately preceding his discharge was his activities on behalf of the Union, one may reasonably infer, as I do here, that it was this conduct which led Respondent to abrupty discharge Borrero (as well as Rodriguez) in anticipation that their dismissals would effectively nip the nascent union movement in the bud. Thus, as the Respondent failed to establish that it had legitimate, nondiscriminatory reasons for discharging Borrero, the General Counsel's prima facie case remains intact, and a finding is warranted that the Respondent discharged Borrero for engaging in union activities in violation of Section 8(a)(3) and (1) of the Act.

d. The challenged ballots

The Respondent, as noted, challenged the ballots cast by Rodriguez and Borrero in the June 29, election on grounds that both were discharged for just cause prior to the election and, consequently, were not eligible to vote, and that in Borrero's case, the latter was in any event ineligible to vote because of his supervisory status. Having found those assertions to be without merit, I further find that both individuals retained their employee status at all times prior to the election with the concomitant right to vote. Accordingly, the challenges to their ballots are overruled. See *Service Employees Union 434-B*, 316 NLRB 1059, 1094 (1995).

²¹On first day of the hearing, a Wednesday, Ana Campos represented that Santos was hospitalized in Ponce and could not be present that day. She further stated that as Santos did not have a phone in her hospital room, she could not communicate with her to determine her availability for Thursday or Friday. On Friday, the last day of the hearing, Campos advised that Santos would not be available to testify at all as she remained ill, due either to appendicitis or an ovarian cyst. However, when the General Counsel represented that he had had a conversation with Santos the day before, and that Santos had been at work, Campos acknowledged this fact, but averred that Santos was in too much pain to travel to the hearing on Friday. She further conceded, however, that Santos was in fact working that very day, Friday. I am not convinced that Santos was unavailable to testify due to illness, for whatever ailment she purportedly suffered from, it obviously was not enough to keep her from performing her duties for Respondent on Thursday or Friday, while the hearing was still in progress. Rather, the above representations by counsel persuade me that neither Respondent nor Santos was very eager for the latter to testify, and that her testimony in all likelihood would not have supported Respondent's position regarding this incident.

CONCLUSIONS OF LAW

- 1. The Respondent, Servicios Sanitarios de Puerto Rico, Inc. d/b/a A-1 Portable Toilet Services, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union, Sindicato Puertorriqueno de Trabajadores, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By telling Rodriguez that the Union would knock down the "kiosk," the Respondent implicitly threatened him with the closure of its facility and loss of jobs should employees decide to unionize, and violated Section 8(a)(1) of the Act.
- 4. By discharging employees Rafael Rodriguez and Fernando Borrero on May 10, 1994, for engaging in activities on behalf the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.
- 5. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the Respondent has been found to have unlawfully discharged employees Rafael Rodriguez and Fernando Borrero on May 10, 1994, it shall be ordered to offer them immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of pay or benefits they may have suffered as a result of their discriminatory discharges. The amount of backpay owed to them shall be computed in accordance with the formula established in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest on such amounts to be computed in manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to their unlawful discharges, and to notify Rodriguez and Borrero in writing that it has done so.

Finally, having overruled the challenge to the ballots of Rodriguez and Borrero, the Regional Director for Region 24 shall be directed to open and count their ballots and to thereafter issue a certification appropriate to the final tally of valid votes cast.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended²²

ORDER

The Respondent, Servicios Sanitarios de Puerto Rico d/b/a A-1 Portable Toilet Services, Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a), Discharging or otherwise discriminating against Rafael Rodriguez and Fernando Borrero, or any other employee, because of their activity on behalf of, of their support for, Sindicato Puertorriqueno de Trabajadores, or any other labor organization.
- (b) Threatening employees with the closing of its facility and loss of jobs if they bring in the Union.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Offer Rafael Rodriguez and Fernando Borrero immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights and privileges they previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.
- (b) Remove from its files any references to the unlawful discharges of Rafael Rodriguez and Fernando Borrero, and notify them in writing that this has been done, and that their May 10 discharges will not in any way be held against them.
- (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.
- (d) Post at its facility in Ponce, Puerto Rico, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."